MALAYSIAN REPORTS

KRISHNAN & ANOR. v. CHOW WING KHUAN

[S C. (Abdul Hamid Ag. L.P., Seah & Syed Agil Barakbah S.C. JJ.) March 24 & April 23, 1986]

[Kuala Lumpur – Supreme Court Civil Appeal No. 247 of 1985]

Tort – Negligence – Motor accident – Quantum of damages – Pre-trial loss of earnings – Loss of earning capacity.

In this case the respondent sustained injuries as a result of a motor accident due to the alleged negligence of the first appellant in driving a motor lorry as the servant or agent of the second appellant, the owner of the said vehicle. The learned trial judge found the lorry driver wholly to be blamed and liable for the accident. He awarded damages (*inter alia*) (a) for partial loss of pre-trial earnings for 30 months at $500 p.m. = $18,000 with 4% interest from date of accident and (b) for future loss of earnings on 15 years' purchase at $500 p.m. = $62,300 with no interest. The appellants appealed against these awards.

Held: (1) from the facts and circumstances in this case the period of five months should be deducted from the thirty months as the respondent worked only ten months a year and the sum of $300 is a fair and reasonable sum for monthly partial loss of income instead of $500 bearing in mind that his average monthly income according to his income tax returns was $800. The award of $18,000 should therefore be reduced to $7,500;

(2) in the circumstances there was substantial or real risk that the respondent will be unable to carry on his work as a tractor driver but would get a less paid employment or source of earning because of the effect of the injuries sustained. He should therefore be awarded damages for loss of earning capacity instead of loss of future earnings. The sum of $32,000 would be fair and reasonable compensation assessed at $300 p.m. for a period of twelve months' purchase. The sum of $62,000 awarded is manifestly excessive and is set aside and substituted with the sum of $32,000.

Cases referred to:

(1) *Ngooi Ku Siong* v. *Aidi Abdullah* [1985] 1 M.L.J. 30.
(2) *Moeliker* v. *A. Reyrolle & Co. Ltd.* [1977] 1 All E.R. 9, 33, 34.

SUPREME COURT.

R.K. Nathan for the appellants.

A. Mariadass for the respondent.

Cur. Adv. Vult.

Syed Agil Barakbah S.C.J. (delivering the Judgment of the Court): The appellants in this appeal were the first and second defendants in the Court below against whom a claim was made by the respondent/plaintiff for general and special damages for the injuries sustained by him as a result of a motor accident due to the alleged negligence of the first appellant in driving motor lorry No. PV 396 as servant or agent of the second appellant who was at all material times the owner of the said vehicle on May 23, 1980. At the material time, the respondent was driving motor car AAG 1117 which collided into the said lorry after the lorry had made a sudden 'U' turn in front of the car. The learned Judge found the lorry driver wholly to be blamed and liable for the accident. He awarded the following damages:

1. General damages for the injuries, pain and suffering and loss of amenities - $20,000 with 8% interest from date of service of writ.

2. Total loss of pre-trial earnings for 19 months at $800 p.m. = $15,200 with 4% interest from date of accident.

3. Partial loss (pre-trial) of earnings for 30 months at $500 p.m. = $18,000 with 4% interest from date of accident.

4. Future loss of earnings on 15 years' purchase at $500 p.m. = $62,300 with no interest.

5. Agreed special damages – for police report, specialist report *etc.* = $1,270 with 4% interest from date of accident.

Originally, the appeal was against the whole of the Judge's decision. However, at the hearing of the appeal, learned counsel for the appellant proceeded only on the issue of quantum of damages and appeared to have abandoned the appeal against liability. He accepted the awards under paragraphs 1 and 2 above but disputed the awards at paragraphs 3 and 4. We allowed the appeal with costs here only and we now give our reasons therefor.

It was submitted that the sum of $18,000 awarded by the learned Judge for partial pre-trial loss of earnings for 30 months at the rate of $500 per month was excessive on the ground that there was evidence that the respondent went back to work in Sarawak for about eight months, and that before the accident he worked about ten months in a year. We note that for the award of $18,000 the period should be thirty-six months and not thirty months as intended. It is common ground that prior to the accident, the respondent was a tractor driver working for his father for about six years

from the age of eighteen. He also worked for other employers and alleged that he was earning about $1,500 a month. In 1977, he went to work in Indonesia also as tractor driver and claimed that he was earning between M$2,000 and M$3,000 a month. He came back to Malaysia on a holiday and it was during that time that he met with the accident, as a result of which he received quite serious injuries. He was hospitalised for about 23 days and operated on at the General Hospital, Ipoh. The reports of the medical specialists who examined him were considered by the learned Judge. The respondent was unable to resume work due to the effects of the injuries he received until the time he went to Sarawak to work as a tractor driver. We are of the opinion from the facts and circumstances that the period of five months should be deducted from the thirty months since he worked only ten months a year and the sum of $300 is a fair and reasonable sum for monthly partial loss of income instead of $500 bearing in mind that his average monthly income according to his income tax returns was $800. The award of $18,000 under this head should be reduced to $7,500. We therefore set aside the former award and substitute it with the award of $7,500 with 4% interest as prayed.

The other dispute relates to future loss of earnings. The learned Judge awarded the sum of $62,300 according to the Annuity Table by allowing fifteen years' purchase basing on the age of the respondent being thirty-five at the date of the trial and accepting $500 as the average monthly earnings of the respondent. It was submitted that the learned Judge should have awarded to the respondent damages for loss of earning capacity instead of for future loss of earnings. The difference relating to the two heads is discussed in *Ngooi Ku Siong* v. *Aidi Abdullah*[1] by the Federal Court which applied the test in *Moeliker* v. *Reyrolle & Co. Ltd.*[2] We would like to adopt this principle as quoted:

"Loss of future earnings and loss of earning capacity distinguished

. . . Future loss of earnings or loss of prospective earnings are awarded for real assessable loss *i.e.* loss that is capable of assessment at the date of the trial. It must be proved by evidence and not by mere speculation. In the absence of such evidence if the court is satisfied that the plaintiff has suffered a loss of earning capacity, he will be awarded a sum as part of the general damages for his disability suffered as a result of the injuries sustained, instead of compensation for loss of future earnings. It arises where there is a residual risk that the plaintiff might be thrown out of work altogether at some future date. The risk must be real and not speculative or fanciful. Any loss of money is relevant, whether the money is properly described as "earnings" or not, provided that the money is more than a "mere possible contingency". Thus loss of possible contract as opposed to loss of probable contract is not recoverable. (See *Kemp and Kemp* on the Quantum of Damages, Volume 1, Fourth Edition on pages 122 and 123). Generally both items need not be specifically pleaded as in the case of special damages but averred in general terms in the pleadings . . . "

On page 34,

"Loss of future earnings

. . . On the principle stated above for loss of future earnings there must be evidence of a real and substantial loss which must not be remote and speculative . . . "

And on page 35,

"Loss of earning capacity

The learned judge followed the test applied in *Moeliker* v. *A Reyrolle & Co. Ltd.* which states that a claim for loss of earning capacity is only available when the plaintiff was in employment. The word "only" should be corrected and read as "generally" since the statement is erroneous. (See Browne LJ's later view in *Cook* v. *Consolidated Fisheries Ltd.*) It is therefore immaterial whether the plaintiff was in or out of employment at the time of the trial so long as the court is satisfied there is substantial or real risk that he will some time at the end of his working life lose his job or get a less paid employment because of the effect of the injuries sustained. (See Denning MR in *Cook* v. *Consolidated Fisheries Ltd.* [1977] I.C.R. 635 at page 639) . . . "

The question is whether we should award loss of earning capacity to the respondent. Medical evidence showed that the effect of the injury to the left side of his neck resulted in weakness and wasting of muscles of his left upper limb, *i.e.* difficulty in moving the left shoulder joint and left elbow joint and not able to grip properly with his left hand. He will not be able to do any work that involves lifting heavy weights, working on scaffoldings and work that requires unrestricted use of both his upper limbs. In that condition, he might not be able to continue work as a tractor driver. However, he did work for about eight months in Sarawak and is still a tractor driver at the date of trial.

It is probable that he may be able to drive the small type of tractor instead of the heavier type, *e.g.* bulldozer, and that would be only for a certain period of time. In the circumstances, we are satisfied that there is substantial or real risk that he will be unable to carry on his work as a tractor driver but will get a less paid employment or source of earning because of the effect of the injuries sustained. We agree therefore that he should be awarded damages for loss of earning capacity instead of loss of future earnings. We are of the view that $32,000 is a fair

and reasonable compensation assessed at $300 per month for a period of twelve years' purchase. We agree that the sum of $62,300 is manifestly excessive. We set it aside accordingly and substitute it with the sum of $32,000.

Order accordingly.

Solicitors: *R.K. Nathan & Co.; Mariadass, Lock & Ainuddin.*

CHUNG HWA YING v. PHANG MUN MOOI & ANOR.

[S.C. (Abdul Hamid Ag. L.P., Seah & Syed Agil Barakbah S.C. JJ.) March 23 & April 23, 1986]

[Kuala Lumpur – Supreme Court Civil Appeal No. 171 of 1985]

Practice and Procedure – Accident claim – Failure of trial judge to consider relevant evidence – Whether appellate court justified in interfering with conclusion of trial judge on facts.

Evidence – Conclusion on facts by trial judge – Intervention by appellate court.

In this case the respondents were the administrators of the estate and for the benefit of the dependants of the motor accident involving a motor car which he was driving and which collided into a motor lorry driven by the appellant. The respondents' claim for damages was on behalf of the estate and for the benefit of the dependants of the deceased. The learned trial judge held both the appellant and the deceased equally to be blamed for the accident. The appellant appealed. The only issue relates to the question of liability.

Held, allowing the appeal: (1) in normal cases, the appellate court is reluctant to interfere with the Judge's conclusion on the facts because as a trial judge he had the opportunity to see and hear the witnesses and is in a better position to weigh their evidence;

(2) in the present appeal, however, the trial judge had failed to make proper use of this opportunity and has come to a wrong conclusion on the facts which in the circumstances necessitates the appellate court to interfere and prevent a miscarriage of justice;

(3) it is clear that the lorry in this case was at the material time travelling on its correct side of the road. The appellant had to keep to his side while following the slow moving bicycle in front as it was approaching the hump which probably concealed his view of oncoming traffic for a while. It was obvious from the evidence that the deceased was driving his car at a fast speed and lost control of it after it had skidded and in the result collided with the lorry and then two other vehicles and ended facing the way it came;

(4) the learned trial judge in this case had failed to test the evidence with the mute evidence *viz.*, the sketch plan, the photographs and the police reports.

SUPREME COURT.

S.K. Yeoh for the appellant.

Lal Harcharan Singh (*Gurdial Singh* with him) for the respondents.

Cur. Adv. Vult.

Syed Agil Barakbah S.C.J. (delivering the Judgment of the Court): We allowed this appeal with costs here and the Court below and set aside the Order made by the learned trial Judge in favour of the plaintiffs/respondents. We also ordered the deposit to be refunded to the appellant. We indicated giving our reasons for allowing the appeal.

The respondents are the administrators of the estate of the deceased who died of injuries received in a motor accident on April 25, 1978, involving a motor car AU 6365 which he was driving and which collided into a motor lorry NE 5636 driven by the appellant. The respondents' claim for damages was on behalf of the estate and for the benefit of the dependants of the deceased.

The learned trial Judge held both the appellant and the deceased equally to be blamed for the accident. The appellant being dissatisfied with the decision has now appealed. The only issue involved relates to the question of liability. The quantum of damages will be decided later.

It was alleged that the collision between the two vehicles occurred on the hump-bridge, somewhere in the middle of the road, and that the motor lorry was trying to overtake a bicycle proceeding towards the hump of the bridge and travelling at about 30 m.p.h. It was conceded by the learned counsel for the respondents that just prior to the accident the motor lorry was not overtaking the bicycle, but the appellant was paying more attention to the bicycle in front of him than the road.

The sole question was whether the lorry was travelling on its proper side of the road when the accident happened. It was submitted that the learned Judge came to a wrong finding on the facts when he concluded that the lorry was in the process of overtaking the bicycle and in doing so went to its right slightly over the centre of the road as it was travelling faster than the bicycle. It was at this stage that a collision occurred between the lorry and the oncoming car which skidded when it moved to the centre of the road. It was not clear why the car skidded, but he accepted the evidence of the only